218767

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

STB Finance Docket No. 34982

JAMES RIFFIN D/B/A THE NORTHERN CENTRAL RAILROAD—ACQUISITION AND OPERATION EXEMPTION—IN BALTIMORE CITY, MD

COMMENTS OF W. R. ALLEN ASSOCIATES

Prepared By:

Michael E. Allen
W.R. Allen Associates
P.O. Box 662
Rocky Hill, NJ 08553
609-683-0356

March 6, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423

STB Finance Docket No. 34982

JAMES RIFFIN D/B/A THE NORTHERN CENTRAL RAILROAD—ACQUISITION AND OPERATION EXEMPTION—IN BALTIMORE CITY, MD

COMMENTS OF W. R. ALLEN ASSOCIATES

W.R. Allen Associates is a transportation consulting firm which specializes in matters relating to railroad real estate. This has included researching of historical title to various properties, preparation of historical materials concerning the use of the properties, and analysis of continued viability for railroad purposes.

On January 12th James Riffin, DBA the Northern Central Railroad, filed a Verified Notice of Exemption for the acquisition and operation of approximately two miles of railroad in the City of Baltimore. On February 7th the Board issued a decision the instant case staying the exemption until various issues raised by Baltimore Streetcar Museum, CSX Corporation, and the Maryland Transit Administration could be examined more fully.

Normally we would not be commenting on this matter as we have not been retained by any of the parties involved nor do we have a stake in the property. However, in a document filed on February 20th, APPLICANT"S RESPONSE TO CSXT, MTA, and BSM COMMENTS MOTION FOR DETERMINATION (218550), Mr. Riffin appears to claim that the publication

by the Board of his notice in JAMES RIFFIN D/B/A THE RARITAN VALLEY CONNECTING RAILROAD - ACQUISITION AND OPERATION EXEMPTION - ON RARITAN VALLEY CONNECTING TRACK, STB Finance Docket 34963 (Served December 20, 2006) he has become a class III Carrier[1] (hereinafter "*Raritan*"). As we have had an interest and involvement in that property we offer the following comments

First, we dispute Mr. Riffin's contention that the notice *per se* makes him a Class III carrier.

On November 28, 2006 W.R. Allen Associates filed comments on that transaction concerning the status of that property, document number 218151, which are incorporated herein by reference. Further, the undersigned, then acting as the Chief Operating Officer of Standard Terminal Railroad of New Jersey, was a party to MORRISTOWN & ERIE RAILWAY, INC. — OPERATION EXEMPTION — SOMERSET TERMINAL RAILROAD CORPORATION, STB Finance Docket No. 34267 (served Nov. 27, 2002) (Hereinafter "*Morristown*").

Mr. Riffin's notice in *Raritan* stated that he intended to reach an agreement with the owner, which he believed to be Consolidated Rail Corporation (Conrail)[2], within 90 days of December 6th 2006. Today represents the 90th day subsequent and there has been no indication that an agreement as either been reached or is in the offing.

In an order dated December 12th, 2006 in *Raritan* the Board stated:

---

[1] Mr. Riffin makes the same claim based on *AB-55 659 X CSX Transportation Inc. – Abandonment Exemption – in Allegany County, MD*, served August 18, 2006. We take no position concerning that claim.

[2] We further dispute Mr. Riffin's contention that the property belongs to Conrail due to what amount to de minimis ministerial errors in its conveyance to the current owner, however that is beyond the scope of the current pleading.

"Any party that may wish to seek a stay of the amended notice of exemption, including NS if it decides to renew or supplement its request for stay, should explain why the Board should stay the effectiveness of an exemption to acquire and/or operate a rail line that would simply give permissive authority to consummate a transaction described in the notice of exemption, if and when the parties might have the legal capacity to do so. See Standard Terminal Railroad of New Jersey, Inc.—Acquisition Exemption—Rail Line of Joseph C. Horner, STB Finance Docket No. 34551 (STB served Oct. 8, 2004) (the publication of notice and the effectiveness of an exemption does not constitute any finding by the Board concerning the ownership of the property involved); see also Morristown & Erie Railway, Inc.—Operation Exemption—Somerset Terminal Railroad Corporation, STB Finance Docket No. 34267 (STB served Nov. 27, 2002) (denying a stay request notwithstanding the existence of a dispute over whether Somerset Terminal Railroad Corporation possessed the operating rights sought to be acquired). Those proceedings evidently concerned the same property that is the subject of Applicant's amended notice of exemption."

In *Morristown*, in an order served on November 27th, 2002 denying Standard's request for a stay, the board stated:

"The effectiveness of the exemption invoked by M&E in this proceeding does not constitute any finding by the Board concerning the ownership of the property involved. The exemption permits M&E and STRC to consummate the described transaction if and when they, in fact, have the legal capacity to do so."

In yet another notice concerning this same piece of track and right-of way, STANDARD TERMINAL RAILROAD OF NEW JERSEY, INC.--ACQUISITION EXEMPTION--RAIL LINE OF JOSEPH C. HORNER Finance Docket 34551 (served October 8th, 2004) (hereinafter "*Standard*") The Board stated:

"Publication of this notice and effectiveness of the exemption does not constitute any finding by the Board concerning the ownership of the property involved. The exemption merely permits STRR and Mr. Horner to consummate the described transaction if and when they, in fact, have the legal capacity to do so."

From the above it should seem clear that an Operating Exemption does not, in and of itself, actually convey any rights or authority to use a piece of property, particularly that specific piece of property, until and unless the party obtaining the Exemption has separately obtained (or is able to obtain) the rights to enter upon and use the property. The granting by the board of

permission to consummate the transaction is merely that – permission. It does not compel consummation by any of the parties. Since the transaction for which the exemption in *Raritan* was obtained has not been consummated we do not believe that James Riffin DBA The Raritan Valley Connecting Railroad is in fact a Class III carrier.

Second, we do not believe that Mr. Riffin has proven that, subsequent to the abandonment by the Maryland and Pennsylvania Railroad, the Pennsylvania Railroad (PRR) ever operated the line, or any part of it, in common carrier service.

Mr. Riffin's Exhibit 1 is a partial printout of a web site, "B-More Ghosts Railroads" http://www.btco.net/ghosts/railroads/mpa/mapapf.html. While interesting the site provides no substantiation for its claim that the track crossing Falls Road under the North Avenue Bridge was installed by the PRR and does not address the issues of ownership of the property or the common carrier status of the line.

The map of the Baltimore Terminal Facilities 1955 attached appears to be copied from page 90 of The Ma and Pa, A History of The MARYLAND & PENNSYLVANIA RAILROAD, (Hilton, George W., Howell-North Books, Berkley, CA, 1963) and is credited to the Baltimore Society of Model Engineers. There is no provenance in the book attesting to the accuracy of the map or its source. It further appears to have been erroneously annotated by Mr. Riffin as it shows the switch ("Morgan Millwork turnout") which he discusses drawn to the north of the B&O (now CSX) overpass when in fact it is south of the overpass, between it and North Avenue. Professor Hilton makes no mention in his book of operation of any of the trackage by the PRR

The undersigned walked the track in question on Wednesday February 28th, 2007 and will confirm Mr. Riffin's observations concerning the rail weight in the section of track visible on either side of North Avenue. In addition markings on the rail indicate 153 lb rail in the switch was rolled in the 1940s and the tie plates on the 131 lb rail are dated 1937. The headwear on the 131Lb rail indicates that it is relay, thus lending credence to the idea if the installation was not made subsequent to the abandonment, that it was certainly made late in the life of the Maryland and Pennsylvania's operation in Maryland.

While this all makes for interesting speculation, It does not constitute proof that the PRR operated the track as common carrier trackage or that, if in fact they did, that the operation extended "several thousand feet" to the north. If in fact the PRR served Morgan Millwork after the abandonment of the track by the Maryland and Pennsylvania and had gone to the trouble of installing a new switch at North Avenue it is unlikely that they operated any farther north than the headroom needed to switch the siding, more on the order of a few hundred feet. The only reason for which we can see for the PRR to have operated "several thousand feet" north would be to access the Baltimore and Ohio (B&O) interchange and there is no evidence that this occurred. Despite this Mr. Riffin has annotated the hand drawn map which was his Exhibit 3 as showing the Maryland and Pennsylvania track as far a 29th Street and the B&O interchange as being PRR track

There are three alternate theories which present themselves. One is that the switch was installed at some point by the Maryland and Pennsylvania so as not to have to switch through their passenger station. The second is that, subsequent to the abandonment, the PRR operated the track as a private industrial spur on private property (that of the customer and the City). The third

is that since it is unclear from the map provided where the property line between the PRR and the Maryland and Pennsylvania was, that Morgan was always switched by the PRR and that the map does not show this as it is not Maryland and Pennsylvania trackage. The fact that the alternate theories fit the fact set given by Mr. Riffin shows that it is not conclusive proof that that the PRR operated the track as common carrier trackage and that the question, if it is even relevant to this proceeding, remains unanswered.

The real issues raised here are: 1. Whether or not the concept of an Exemption, as opposed to a Certificate of Public Convenience and Necessity, vests the holder with any form of enforceable property right that he would not otherwise hold; and, 2, Whether or not a party with no interest in the original transaction can, at a much later date (in the instant case almost half a century and in *Raritan* more than decade) unwind a de facto abandonment and the subsequent sale of the property in order in order to claim the nebulous rights cited in 1. above. We believe that in both cases the answer should be No.

The first question is not merely theoretical. While the property ownership issues raised in Morristown were still before the courts, and not withstanding the clear wording in the boards decision that the exemption would not be effective until those issues were decided by the court, employees of the Morristown and Erie entered what was then Standard's Property in an attempt to begin operations, Somerset Terminal issued at least one bill of lading on behalf of the Morristown and Erie, and Somerset's attorney managed to elicit testimony before the Bankruptcy Court from an officer of the Morristown and Erie that he believed that the exemption as it stood gave them the right to operate the property. This was before the initial decision

(reversed on appeal) awarding the property not to Somerset or Standard but to Bridgewater Resources, the reorganized debtor.

To claim the right to use of a piece of property solely on the basis of an Exemption is nothing more than a taking of the property with out even the safety net of an eminent domain proceeding to establish value and compensation to the owner. This is, as the Board has stated repeatedly, is well beyond the boards charter.

Based the various records before the Board, it would appear that Mr. Riffin has used his purported status as a railroad to cloud various proceedings that otherwise would be unrelated to common carriage by rail. Though it has not been established in the record before the Board, it is the undersigned's belief that at least one other promoter-without-a-railroad has attempted to use the status purportedly conveyed by the granting of an exemption to evade financial liability on at least two occasions. This use of an Exemption is nothing more than an abuse of the process and is no more tolerable than its use to claim property.

We concur with CSX's filing of February 2nd in this matter, that there should be certain basic thresholds of detail and accuracy in order to use the Exemption process and that among these the petitioner should be required to show a reasonable likelihood of being able to acquire the right to use the property with out any type adversarial proceeding. At a minimum this should include a clear, verifiable statement as to the ownership and of the status of the agreement with the owner, not the "we will negotiate when we figure out who owns it" type of statement which was presented in both *Raritan* and in this matter.

On the second question – it would appear from the record that Mr. Riffin had no standing or interest in the abandonment of the Maryland and Pennsylvania's Maryland trackage and in the discontinuance of service (by whatever means) to Morgan Millwork and no standing or interest in Conrail's de facto abandonment of the Raritan Valley Connecting Track. In both cases the railroad ceased using the track and sold its interests in the underlying ground. In this case there may have been a ministerial error on the part of the Pennsylvania railroad in failing to obtain the proper authority to cease serving Morgan Millwork but this has not been established. Further, this error would only affect a few hundred feet of trackage, not the several thousand that Mr. riffin claims and would need in order to connect with CSX. In *Raritan* there clearly appears to have been such an error as the property was not formally abandoned before either sale. Mr. Riffin, however does not appear to have been a party to either transaction or to have been injured by either error, nor does there appear to have been any damage to the general good or to interstate commerce.

The "not abandoned" argument bought forth by Mr. Riffin appears to be an attempt to facilitate the taking described in the first question. By voiding the transactions which have already occurred and vesting title in the property (which would then be unused, un-abandoned right-of-way) in the company which might still hold title had the property not been sold, it would then have to be re-abandoned, appearing opening the door for Mr. Riffin, or another Exemption holder, claiming rights under the Exemption, to be able to acquire the right to use the property under rules that may not have even existed at the time of the sale and at far lower cost than purchasing it at market value from the property owner.

The whole concept of the exemption process is to allow routine, non-controversial, matters to be handled expeditiously. The taking of a property or the right to use that property without the owner's consent is almost by definition a controversy and is therefore not an appropriate use of the exemption process. The unwinding of property rights, particularly decades after a good faith transaction is clearly controversial not at all appropriate for the board but is properly in the courts. We would therefore ask that the Board consider the suggestions made by CSX and take what ever action it deems necessary to prevent further such abuse of its process while not unreasonably raising the bar for prospective operators.

Respectfully Submitted

/s/ *Michael E. Allen*
Michael E Allen
W.R. Allen Associates
P.O. Box 662
Rocky Hill, NJ 08553

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the foregoing comments of W.R. Allen Associates upon all parties of record herein by causing a copy thereof to delivered via E-Mail and /or First Class Mail postage prepaid at Rocky Hill, New Jersey this 6th day of March, 2007, addressed as follows:

James Riffin D/B/A NCRR (Regular Mail)
1941 Greenspring Dr
Timonium, MD 21093

Christopher M. McNally, Esq. (E-Mail)
Baltimore Streetcar Museum, Inc.
P. O. Box 4881
Baltimore, MD 21211

Louis E. Gitomer, Esq. (E-Mail)
600 Baltimore Avenue, Suite 301
Towson, MD 21204

Charles A. Spelunk, Esq. (E-Mail)
Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 905
Washington, D.C. 20036

/s/ *Michael E. Allen*